Criminal Appeal (DB) No. 151 of 1988
With
Criminal Appeal (DB) No. 154 of 1988

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Against the judgment and order dated 8.2.1988 passed by learned 1st Additional Sessions Judge, Vaishali at Hajipur in S.T.no. 129/86 arising out of Sarai P.S.case no. 83/85 corresponding to G.R.no. 1725/85.

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Vijay Kumar Jha ---------- Appellant
(In Cr.Appeal No. 151/88)
Chitranjan Singh alias Sharma ---------- Appellant
(In Cr.Appeal No. 154/88)
versus
The State of Bihar ----------Respondent
(In both the appeals)

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For the appellants: Mr. Kanhaiya Prasad Singh, Sr. Advocate
For the State: Mr. Lala Kailash Bihari Prasad, P.P.

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P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE MADHAVENDRA SARAN

M.Saran,J., These two Cr.Appeals arise out of the same judgment and order dated 8.2.1988, passed by learned 1st Additional Sessions Judge, Vaishali at Hajipur in S.Tr.no. 129/86, arising out of Sarai P.S. case no. 83/85, corresponding to G.R.no. 1725/85, whereby and whereunder both the appellants have been convicted under section 302/34 of the Indian Penal Code (in short as IPC), and have been sentenced to undergo rigorous imprisonment for life. Appellant Chitranjan Sharma of Cr.Appeal no. 154 of 1988, has further been convicted under section 27 of the Arms Act but no separate sentence has been awarded.

2. The prosecution case ran as follows:-

Informant Sanjay Kumar (P.W.7) on 24.9.1985, at 20.00 hours, gave fardbeyan before the S.I., P.H.Singh, in the field of Jai Narayan Sahni of village Dumri to the effect that he had also gone to Rani Pokhar Pethiya. He returned from Pethiya and was standing at the Ranipokhar road. His father Gamalal Sharma, who was a teacher in Mahua school came from Mahua on a Jeep and got down at the shop of one Bhageran Rai. After taking bi-cycle from the shop, the informant's father came to the tea stall of Parichhan Mahto and took tea. From there the informant and his father both proceeded on the same bi-cycle for their home at 5.00 PM. He further stated that near the house of Bijali Sharma the informant got down from the carrier of bi-cycle as the road condition was not good and proceeded on foot but his father proceeded on the bi-cycle and took a turn towards north on the one track passage near the field of Ramayan Sharma. The informant met one Kedar Chaudhary near the aforesaid turning and got engaged in gossiping. It is further stated that the informant and Kedar Chaudhary followed Gamalal Sharma and while they were at a distance of 50-60 yards from the informant's father, who had reached near the field of Daya Sharma, there was a bomb explosion and the informant found that his father was injured. Accused appellant Vijay Kumar Jha then attacked his father from behind. The informant raised alarm and in the meantime appellant Chitranjan Sharma fired upon his father from a pipe gun which hit on his chest as a result of which he fell down in the field of Daya Sharma. The occurrence is said to have witnessed by Shashi Bhushan Singh also who was coming from the northern direction. The two appellants fled away through maize and paddy fields when the informant's father fell down.

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The informant reached there and found that his father was already dead. Many persons having heard the alarm, reached the spot to whom the informant narrated about the occurrence. On the basis of fardbeyan of the informant, the police registered the case. Inquest report of the deceased was prepared. The police investigated the case and submitted charge sheet. After cognizance, the case was committed to the court of sessions. The accused appellants faced the trial and were convicted and sentenced as mentioned above.

3. The defence of the accused appellants was total denial of the alleged occurrence. The appellants did not produce any oral or documentary evidence in their defence.

4. Thus the sole question now arises for consideration is whether the prosecution has been able to establish its case against the accused appellants beyond all reasonable doubts.

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5. In order to bring home the charges the prosecution examined in all 12 witnesses.

P.W.1 Sheela Nath Singh claims to have seen the occurrence. P.W.2 Chandraket Prasad Singh is a formal witness who has simply proved the formal FIR (exhibit-1). P.W.3 Rajendra Prasad Singh is also a formal witness who has proved the seizure list (exhibit-2). P.W.4 Ishki Rai is a hearsay witness and has claimed to have seen the appellants fleeing away in the western direction. P.W.5 Ajoy Kumar is also a hearsay witness. He is son of the deceased. P.W.6 Shashi Bhushan Singh has also claimed to have seen the occurrence. P.W.7 Sanjay Kumar is the informant. P.W.8 Dr. Anil Kumar Singh is the doctor who performed autopsy over the dead body of deceased Gamalal Sharma. P.W.9 Sunil Kumar Thakur is a formal witness who has identified signature (exhibit-

2/1) of S.I. Paramhansh Singh. He has further identified the signature (exhibit-3/5) of Paramhansh Singh on the inquest report. He has proved the fardbeyan (exhibit-5), and the case diary (exhibit-6). According to this witness, S.I. Paramhansh Singh is dead. P.W.10 Upendra Sharma, P.W.11 Baldeo Rai, and P.W.12 Vijay Kumar are hearsay witnesses.

6. P.W.8 Dr. Anil Kumar Singh on 25.9.1985 was posted as Civil Assistant Surgeon at Hajipur Sadar Hospital. On the same day at 9.00 AM, he performed post-mortem examination on the dead body of Gamalal Sharma and found the following ante-mortem injuries:-

(i) Lacerated wound with irregular charred and inverted margin 1 ½" x 1" x entering into the cranial cavity on the right parietal region being wound of entrance of the gun shot injury on the head with laceration of the brain substance at the site of the injury. Cranial cavity was full of blood and blood clots. 23 pillets and three cork pieces taken out from the cranial cavity embedded in the brain substance were preserved in a separate sealed vial and handed over to the accompanying constable for needful. Hair in a radius of 2" from the wound of entrance was found burnt and the scalp of the area blackened;

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(ii) Penetrating wound 1 ½" x ¼" x entering into the pleural cavity penetrating the right lung in front of the chest in the right side. Right side pleural cavity was full of blood and blood clots. Right lung was completely lacerated. The direction of penetrating substance was medially and posteriorly.

Injury no. (i) was caused by fire arms (gun shot) where as injury no. (ii) was by sharp penetrating substance such as dagger. In the opinion of the

doctor the death took place due to shock and haemorrhage as a result of abovementioned injuries. The post mortem report is exhibit-4. Time elapsed since death and post mortem examination within 18 hours. Now the question is who caused the above injuries and in what manner the same were caused.

7. P.W.7 Sanjay Kumar is the informant of this case. He stated that on 24.9.1985, he was going with his father on bi-cycle from Ranipokhar. He got down from the carrier of the bi-cycle near the field of Bijali Sahni of village Dumri as the road condition was bad and his father proceeded ahead on the bi-cycle and near the field of Ramayan Sharma his father took turn towards north on one track passage. This witness remained at a distance of 50-60 yards from his father. He heard sound of gun firing. He further saw that both the accused appellants were assaulting his father. Appellant Chitranjan Sharma fired upon his father and appellant Vijay Jha assaulted his father with a weapon like dagger. He raised alarm and ran towards his father. Both the accused began to flee towards west. He further stated that at that time Kedar Chaudhary was with him and Shashi Bhushan Singh was coming from north. They also witnessed the occurrence. He reached near his father and found him lying dead. He further stated that the police officer came at the place of occurrence and recorded his fardbeyan in presence of Jawahar Rai and Janardan Sharma. He identified signatures of Jawahar Rai and Janardan Sharma on the fardbeyan. He also identified his own signature over the same. The three signatures are exhibits-3 to 3/2 respectively. Inquest report was prepared over which Baldeo Rai and Upendra Sharma put their signatures. The signatures are marked respectively as exhibit-3/3 and ¾. He identified both the accused appellants present in the dock. According to this witness, on account of previous enmity,

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both the appellants committed murder of his father. In cross examination this witness stated that he cannot say the place of the body where the shot fired by Chitranjan Sharma hit his father. He also cannot say the place of body where the appellant Vijay Jha inflicted the injury. Then he has further stated that witness Kedar Chaudhary is his cousin who has been gained over by the accused persons.

8. P.W.1 Sheela Nath Singh has claimed to have seen the occurrence. He stated that on the date of occurrence at about 5.00 PM, he was scrapping grass towards south of the place of occurrence. The deceased was going on bi-cycle in the north direction and near the house of Bijali Sahni and Parmeshwar Sahni, two persons surrounded him. Appellant Chitranjan Sharma fired upon the deceased who fell down and Vijay Jha gave a dagger blow to the deceased. After making assault, both the accused fled away. According to this witness, due to previous enmity, the accused committed the occurrence. This witness in cross examination has admitted that he fought many cases and that the deceased was a surety on his behalf in some case. Gamalal Sharma had also deposed in his favour in some cases.

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9. P.W.4 Ishki Ram stated before the court that on the date of occurrence at about 5.00 PM, he was going to Ranipokhar Pethiya on bi-cycle and when he reached near Bhagwati Asthan he heard sound of firing. He proceeded further and when he reached towards north of the house of Parmeshwari Sahni (Mallah) he found Gamalal Sharma lying in the field. Sanjay, the informant, was weeping there. He saw both the appellants fleeing away in the western direction. Chitranjan Sharma was armed with gun and Vijay Jha was carrying dagger. Sanjay told him that his father had been killed

by the two appellants. He found blood oozing from the head and chest of the deceased. In cross examination, this witness stated that Jagdamba Asthan is at a distance of 50 yards from the place of occurrence. He admitted in cross examination that he was examined by the police a month after the alleged occurrence. He identified both the appellants present in court.

10. P.W.6 Shashi Bhushan Singh has also claimed to have seen the occurrence. According to this witness, appellant Chitranjan Sharma fired upon the deceased and the other appellant assaulted him with dagger due to which the deceased fell down and died. It appears from the case diary (exhibit-6) that this witness had not claimed before the police to have seen the occurrence.

11. P.W.5 Ajay Kumar is son of the deceased. His evidence is to the effect that when he came to the place of occurrence after hearing the murder of Gamalal Sharma, he found the dead body lying there. Similar is the evidence of P.Ws 10,11 and 12.

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12. Thus the position is that evidence of P.Ws 1 and 7 is almost similar in nature and according to them Chitranjan Sharma fired upon the deceased and appellant Vijay Jha stabbed him. P.W.4 had seen the appellants running away and according to him, Chitranjan Sharma was armed with gun and the other accused was carrying dagger. The doctor has found fire arms injury and incised wound on the person of the deceased.

13. It has been contended on behalf of the appellants that there has been considerable delay in recording the statements of P.Ws 1 and 4 under section 161 Cr.P.C. and so it is sufficient alone to exclude their testimony. In support of his contention, learned counsel placed reliance on a decision of the Supreme Court reported in AIR 1976 Supreme Court 2488 (State of Orissa Vs

Brahma Nanda) . It is true that P.Ws 1 and 4 were examined a month after the occurrence. P.W.1 is an eye witness to the occurrence, whereas P.W.4 had seen both the appellants fleeing away with weapons. As mentioned above, it has come in the evidence that the Investigating Officer died during the pendency of the case and, therefore, he could not be examined in court. It is true that the delay in recording the statements of witnesses by the police reduces the evidentiary value of their evidence in court but mere delayed examination of eye witnesses under section 161 Cr.P.C. is not sufficient to discard their reliable evidence. P.Ws 1 and 4 have no enmity with the appellants. There are many other factors for delayed examination of the witnesses. It is for the Investigating Officer to find out likely witnesses in course of investigation and the witnesses would not come voluntarily to the Investigating Officer for making statement. There is nothing in the evidence to show that the Investigating Officer was marking time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. Such being the position, the mere delay in recording the statements of P.Ws 1 and 4 is not very material in the present case.

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The decision relied upon by the appellants in the case of State of Orissa Vs Mr. Brahmanand Nanda (supra) it has been observed:

> "Where in a murder case the entire prosecution case depended on the evidence of a person claiming to be eye witness and this witness did not disclose the name of the assailant for a day and a half after the incident and the explanation over for non-disclosure was unbelievable, held that such non-disclosure was a serious infirmity which destroyed the credibility of the evidence of the witness and that the High Court was correct in rejecting it as untrustworthy and acquitting the accused."

The facts involved in that case were quite different and, therefore,

the decision is of no help to the appellants.

14. It has further been contended on behalf of the appellants that the fardbeyan of the informant was recorded on 24.9.1985, at 20.00 hours, but the same was received in the office of the Magistrate on 30.9.1985. The distance of police station from the place of occurrence was 8 kms. He thus contended that the whole FIR is ante-dated and fabricated one. In support of his contention that delay in sending the FIR is fatal, reliance has been placed on the following two decisions of the Supreme Court.

(i) AIR 1971 Supreme Court 1221 (State of Punjab Vs Tarlok Singh).

(ii) AIR 1976 Supreme Court 2423 (Ishwar Singh Vs State of U.P.).

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As mentioned above, the occurrence took place on 24.9.1985, at about 5.15 PM. The fardbeyan of the informant was recorded on the same day at about 8.00 PM at the place of occurrence. The inquest report of the deceased was prepared on the same day at 8.30 PM. The presence of the informant at the seen of the occurrence cannot be doubted. He had seen the occurrence from a distance of 50-60 yards. It was day time. He described the incident in the manner he saw it. He had no personal enmity with the appellants. The enmity was between his father and the appellants. There is nothing to show that the Investigating Officer was marking time with a view to decide about the shape to be given to the case and eye witnesses to be introduced.

In AIR 1976 Supreme Court 2423 (Ishwar Singh Vs State of U.P.) it has been observed:

> "5. Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A.M. on February 14, 1973, was sent out from the police station the next day, February 15; the time when it was dispatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. Section 157 of the Code of Criminal Procedure, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. "

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Then in AIR 1971 Supreme Court 1221 (State of Punjab Vs Tarlok Singh) it has been observed:

> "5. First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 pm. did not reach the Magistrate at Dasuya till 8 a.m. the next date, even though it was sent through a special messenger. The distance between the scene of occurrence and Dasuya was only 15 or 16 miles. The inference sought to be drawn is that, in fact, the report was not lodged at 3.45 pm, but at a much later hour, after the police had arrived at the scene of occurrence and there were consultations to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus, casts doubt on the speculation version that the report was lodged at 3.45 pm without lapse of unnecessary time."

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There cannot be any dispute that the FIR must be dispatched

"forthwith" to the nearest Magistrate. The word "forthwith" occurring in section 151 Cr.P.C. means promptly and without undue delay but it all depends on the facts and circumstances of each case when the circumstances of delay may lead to serious consequences. In the present case, the FIR was lodged promptly. The investigation started promptly on that basis. The informant described the occurrence in the manner he saw it. He could have easily improved his case by stating that Chitranjan Sharma caused fire arms injury on the parietal region, and the other accused inflicted dagger in the chest. Therefore, the fact that there is delay of three or four days in dispatching the FIR to the concerned Magistrate is immaterial in the present case.

In the facts and circumstances of the case, the delayed receipt of the FIR by the Magistrate on 30.9.1985 would not make investigation tainted one nor could FIR be regarded as ante-timed and ante-dated.

15. It has seriously been contended on behalf of the appellants that Kedar Chaudhary who was with the informant at the time of occurrence was not examined as eye witness in the case and, therefore, adverse inference under section 114(g) of the Evidence Act has to be drawn. In support of his contention, learned counsel placed reliance on a decision of the Supreme Court reported in 1971 (2) SCC 42 (State of U.P. and another V. Jaggo alias Jagdish). There cannot be any dispute that it is the prima facie duty of the prosecution to call all the witnesses who must be able to give important information in connection with the occurrence. Learned State counsel in this connection pointed out that from the case diary it appears that Kedar Chaudhary was not a full-fledged witness before the police and so his non-examination is not very material. In this connection, the law is well settled that the application of

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"adverse inference" does not mean that all the evidence of the prosecution must be disbelieved. Merely because a material witness was not examined by the prosecution a criminal court is not lean to draw the adverse inference that if he was examined, he would have given a contrary version. The presumption under section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. The oral evidence of P.Ws 1,4 and 7 is convincing and reliable and so there would be no adverse inference for mere non-examination of one eye witness, Kedar Chaudhary, named in the FIR.

16. Learned counsel seriously contended that the informant had not seen the occurrence otherwise he would not have introduced the story of bomb explosion in the fardbeyan. He contended that when the informant came to know that the medical evidence is otherwise then the prosecution witnesses changed their stand. He thus pointed out that it is a belated attempt to make the oral evidence in line with the medical evidence and, therefore, such stand cannot be allowed. The learned counsel in this connection placed reliance on AIR 1975 Supreme Court 1727 (Ram Narain Vs State of Punjab). It is true that in the fardbeyan the informant says that the appellant Vijay Jha attacked the deceased from behind but in court he stated that attack was from the front side. Then in the fardbeyan the informant says that the shot fired by the appellant Chitranjan Sharma hit in the chest of the deceased, whereas the doctor found the fire arm injury on the parietal region of the deceased. As said above, the doctor has found incised wound in the chest of the deceased. It has to be kept in mind that P.W.7 saw the occurrence from a distance of 50-60 yards. There is evidence of P.W.1 that Vijay Jha assaulted the deceased by dagger. So far as story from behind is concerned, this may be described as misstatement because

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the informant was watching the occurrence from a distance of 50-60 yards.

17. I have seen the case diary and during course of inspection of the place of occurrence, the I.O. did not find any sign of bomb explosion. No bomb injury upon the deceased has been found by the doctor. There is similarity in the sound of bomb explosion and sound of shot. A lay man may some time describe the sound of shots as the sound of bomb explosion. The learned trial court has also made such observation in the judgment. In the decision (supra) relied upon by learned counsel it has been observed:

> "14. Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In Mohinder Singh v. The State, 1950 SCR 821 = (AIR 1953 SC 415 = 1953 Cri LJ 1761) this Court observed in similar circumstances as follows:
>
> "In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle. "
>
> It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."

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18. I have already mentioned above that the alleged occurrence took place at about 5.15 PM. The fardbeyan was recorded at about 8.00 PM

and thereafter, the inquest report was prepared. The post-mortem was done on the next day at 9.00 AM. The FIR was received in the office of the Magistrate on 30.9.1985. No attempt was made by the informant to change the prosecution case in the line with the medical evidence. Therefore, the mis-statement or mis-description of the occurrence mentioned in the FIR is not very material in this case and it cannot be accepted that the evidence of eye witnesses in court was a belated attempt to improve their testimony and bring the same in line with the doctor's evidence with a view to support an incorrect case.

19. It is settled view that the FIR is not a catalogue nor does one expect a just informant, disoriented mind and in distress to give such graphic details. Minor omissions are to be ignored where the prosecution case is otherwise reliable. In the present case, broad features of the occurrence are given in the FIR and, therefore, the FIR cannot be discarded as laconic.

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20. The presence of P.Ws 1 and 7 at the place of occurrence cannot be doubted. The evidence of these two witnesses is supported by the FIR which was recorded on the same day just three hours after the occurrence. P.W.4 saw the appellants running away armed with weapons. Therefore, these three witnesses corroborate each other in material particulars and the manner in which this incident took place.

21. It has come in the evidence of the witnesses that there was past enmity between the appellant Chitranjan Sharma and the deceased Gamalal Sharma. Some cases were pending between them from before. Past enmity between the accused and the deceased appears to be the motive behind the murder. It is true that Vijay Jha had no enmity with the deceased but his participation in the occurrence is well established. The evidence on the record

is sufficient to show that they both participated in the assault and committed murder of Gamalal Sharma. The court below has rightly accepted the evidence of P.Ws 1,4 and 7, and I find no good ground to differ with the findings as recorded by the trial court with respect to the present two appellants.

22. In the facts and circumstances of the case, I find no merit in these two appeals. Both the appeals are accordingly dismissed. The judgment of the trial court is hereby affirmed. The bail bonds of two appellants are hereby cancelled and they are directed to be taken into custody.

(Madhavendra Saran,j)

I agree.

Sudhir Kumar Katriar,J.

(Sudhir Kumar Katriar,J)

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PATNA HIGH COURT

Dated 23 September 2008
AI/AFR